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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

TASH HEPTING, GREGORY HICKS, CAROLYN JEWEL and ERIK KNUTZEN, on Behalf of Themselves and All Others Similarly Situated,,	No. C-06-0672-VRW
Plaintiffs,	**CLASS ACTION**
v.	**DECLARATION OF MICHAEL M. MARKMAN PURSUANT TO FED. R. CIV. P. 56(F) IN OPPOSITION TO MOTION TO DISMISS, OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT BY THE UNITED STATES OF AMERICA BASED ON STATE SECRETS PRIVILEGE**
AT&T CORP., et al.,	Courtroom: 6, 17th Floor
Defendants.	Judge: The Hon. Vaughn R. Walker, Chief Judge

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I, Michael M. Markman, declare as follows:

1. I am an attorney with the law firm of Heller Ehrman LLP, counsel of record for Plaintiffs in this action. I am licensed to practice before this Court and I have personal knowledge of the facts stated herein, unless otherwise indicated.

2. Attached hereto as Exhibit 1 is a true and correct copy of Executive Order Number 12968, dated August 4, 1995.

3. Attached hereto as Exhibit 2 is a true and correct copy of the May 16, 2006 White House Press Conference titled President Bush and Prime Minister John Howard of Australia Participate in Joint Press Availability.

4. Attached hereto as Exhibit 3 is a true and correct copy of the transcript of the CNN Late Edition with Wolf Blitzer interview with Bill Frist, aired May 14, 2006.

5. Attached hereto as Exhibit 4 is a true and correct copy of the May 17, 2006 Scheduling Conference in this matter.

6. Attached hereto as Exhibit 5 is a true and correct copy of the USA Today article titled *NSA Has Massive Database of Americans' Phone Calls; 3 Telecoms Help Government Collect Billions of Domestic Records*, dated May 11, 2006.

7. Attached hereto as Exhibit 6 is a true and correct copy of a statement set forth on the website DenverPost.com from counsel for Joseph Nacchio, CEO of Qwest, dated May 12, 2006.

8. Attached hereto as Exhibit 7 is a true and correct copy of the of Executive Order Number 13292, dated May 25, 2003.

9. Attached hereto as Exhibit 8 is a true and correct copy of the of Executive Order Number 12333, dated December 4, 1981.

10. I am familiar with the records and proceedings in this action, with the exception of the *in camera, ex parte* materials submitted to the Court by the government. Plaintiffs have diligently developed the factual record relating to their claims, and marshaled evidence in support of those claims on the pending motion for preliminary injunction. Although Plaintiffs contend that the evidence already set forth in the record of these proceedings is sufficient to defeat the government's motion, should the Court believe that critical evidence is missing (whether by operation of the state secrets privilege or otherwise), Plaintiffs respectfully submit that further information supporting their claims is in the hands of other parties. Non-privileged discovery is likely to reveal additional facts that will contribute to the genuine issues of material fact that counsel denial of the government's motion in the alternative for summary judgment.

11. The information that Plaintiffs intend to uncover through discovery exists in several sources, as outlined below. As a preliminary matter, Plaintiffs would ask the Court to require Defendants to answer the Amended Complaint, thereby potentially obtaining admissions that would support Plaintiffs' claims.

12. Plaintiffs would request an inspection of the premises of AT&T's [redacted] Street facility under Fed. R. Civ. P. 34, including the [redacted] room, the [redacted], the inside and outside of the [redacted], and the area outside the [redacted] Room. Plaintiffs would also request an inspection of the premises outside of other of AT&T's [redacted] rooms, which the record indicates exist in [redacted]. Klein Decl., ¶ 36.

13. Plaintiffs would take the depositions (or obtain the sworn declarations) of former AT&T employees with knowledge of, and who worked in, the [redacted] Room, doing so in a manner that would protect the identities of these witnesses, as needed.

14. Plaintiffs would take the deposition of government officials, including Michael Chertoff, concerning AT&T's work with the NSA. Plaintiffs could, if necessary, limit the examination to public statements made by Mr. Chertoff and other government officials regarding the existence of the program.

15. Plaintiffs would seek to obtain declarations from, or propound depositions on written questions to, the confidential sources quoted in news reports to overcome the hearsay nature of the news reports in which they were quoted, to the extent Plaintiffs are able to identify those confidential sources.

16. Plaintiffs would take depositions of reporters, including Morton Kondracke, regarding their personal knowledge of published information, and regarding their discussions with non confidential sources of non-privileged information. Plaintiffs would not seek to depose reporters in an effort to identify confidential sources.

17. Plaintiffs would serve requests for admissions regarding the fact of AT&T's interception and disclosure of the named Plaintiffs' communications and data about such communications.

18. Plaintiffs would take the depositions of Qwest executives regarding non-privileged discussions with the NSA pertaining to warrantless wiretapping. Published accounts note that unlike AT&T, Qwest has publicly disclosed that they rejected requests by the NSA that Qwest violate the law by intercepting and disclosing customer communications and data. *See* Ex. 6 hereto.

19. Plaintiffs would propound targeted interrogatories to AT&T regarding: the names, internal designations, IP addresses and circuit IDs of AT&T routers and router interfaces, including but not limited to routers and router interfaces at the [redacted] Street Facility, such that the "traceroute" program could be used to determine the path of electronic communications sent or received by plaintiffs; facts in the record (e.g., the existence of the [redacted] and [redacted], the nature of the data carried by the fiber-optic cable subject to the [redacted], and the equipment provided by AT&T for use inside the [redacted] Room); and the identities of persons with knowledge of those facts, without inquiring about how the intercepted and disclosed data might be filtered and used by the government.

20. Plaintiffs would also propound targeted interrogatories to AT&T regarding facts the information available under 50 U.S.C. § 1806(f) and 1845(f), and the identities of persons with knowledge of those facts, seeking information about the interception of telephone data, and of call data records for the government, and the storage of these materials within AT&T facilities and on AT&T hardware for the government.

21. Each of the topics of specific discovery outlined above is highly likely to yield further evidence of a genuine dispute of material fact relating to all of Plaintiffs' claims.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Francisco, California, this 8th day of June, 2006.

____

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CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the following non-CM/ECF participants:

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By ______________/s/______________

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